

November 2005

Update: Crime Victim Rights Manual (Revised Edition)

CHAPTER 5

Victim Privacy

5.9 Limitations on Access to Court Records

A. General Provisions Limiting Access to Court Records

Insert the following text before the September 2005 update to page 107:

Transcripts generated from court proceedings and filed with the court clerk “are a part of the record for purposes of a sealing order” issued pursuant to MCR 8.119(F). *UAW v Dorsey*, ___ Mich App ___, ___ (2005).

CHAPTER 8

The Crime Victim at Trial

8.14 Former Testimony of Unavailable Witness

C. Defendant's Right to Confront the Witnesses Against Him or Her

Insert the following language after the July 2005 update to page 264:

A non-testifying serologist's notes and lab report are "testimonial statements" under *Crawford v Washington*, 541 US 36 (2004). *People v Lonsby*, ___ Mich App ___, ___ (2005). In *Lonsby*, a crime lab serologist who did not analyze the physical evidence testified regarding analysis that was performed by another serologist. The testimony included theories on why the non-testifying serologist conducted the tests she conducted and her notes regarding the tests. In *Crawford*, "the Court stated that pretrial statements are testimonial if the declarant would reasonably expect the statement will be used in a prosecutorial manner and if the statement is made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Lonsby, supra* at ___, quoting *Crawford, supra* at 51–52. The Court of Appeals found that because the serologist would clearly expect that her notes and lab report would be used for prosecutorial purposes, the information satisfies *Crawford*'s definition of a "testimonial statement." The *Lonsby* Court stated:

"Because the evidence was introduced through the testimony of Woodford, who had no first-hand knowledge about Jackson's observations or analysis of the physical evidence, defendant was unable, through the crucible of cross-examination, to challenge the objectivity of Jackson and the accuracy of her observations and methodology. Moreover, because Woodford could only speculate regarding Jackson's reasoning, defendant could not question or attack Jackson's preliminary test results or the soundness of her judgment in failing to conduct additional tests. Therefore, the introduction of Jackson's hearsay statements through the testimony of Woodford falls squarely within *Crawford*'s prohibition of testimonial hearsay that is reasonably expected to be used by the prosecution at trial. Because there is no showing that Jackson was unavailable to testify and that defendant had a prior opportunity to cross-examine her, the admission of the evidence violated defendant's Confrontation Clause rights, as defined by the United States Supreme Court in *Crawford*." [Footnotes omitted.] *Lonsby, supra* at ___.

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CHAPTER 5

Victim Privacy

5.9 Limitations on Access to Court Records

A. General Provisions Limiting Access to Court Records

On page 107, immediately after the quote of MCR 8.119(F), insert the following text:

Note: When a party files an appeal in a case where the trial court sealed the file, the file remains sealed while in the possession of the Court of Appeals. MCR 7.211(C)(9)(a). Any requests to view the sealed filed will be referred to the trial court. *Id.* MCR 8.119(F) also governs the procedure for sealing a Court of Appeals file. MCR 7.211(C)(9)(c).

August 2005

Update: Crime Victim Rights Manual (Revised Edition)

CHAPTER 4

Protection From Revictimization

4.1 The Victim's Constitutional Right to Reasonable Protection From Revictimization by the Accused

Insert the following text on page 54 immediately before Section 4.2:

See also *Town of Castle Rock v Gonzales*, 545 US ____ (2005) (a person does not have a constitutionally protected property interest in having police officers enforce a restraining order obtained under state law even when the officers have probable cause to believe the order has been violated).

CHAPTER 10

Restitution

10.2 Claims for Restitution Made After Sentencing or Disposition

Replace the last sentence in the partial paragraph at the top of page 312 with the following:

MCR 6.425(E)(1)(f)* requires the court on the record to “order that the defendant make full restitution as required by law to any victim of the defendant’s course of conduct that gives rise to the conviction, or to that victim’s estate.”

In addition, delete the first sentence in the **Note** following the partial paragraph at the top of page 312.

*Effective July 13, 2005. MCR 6.425(E)(1)(f) replaces the former MCR 6.425(D)(2)(f).

CHAPTER 10

Restitution

10.8 Amount of Restitution Required

Insert the following case summary after the first paragraph on page 325:

In *People v Dewald*, ___ Mich App ___, ___ (2005), the defendant was convicted of false pretenses, common-law fraud, and larceny by conversion. During the 2000 presidential election and recount, defendant's political action committees (PACs) solicited \$700,000.00 in contributions from victims through letters that implied affiliation with either the Bush or Gore campaign and recount effort. The victims' donations were not contributed to the campaigns although some of the money was contributed to Democratic and Republican causes. The victims testified that they intended their contributions to go to the campaigns and recount efforts. The trial court ordered the defendant to pay restitution in an amount equal to the victims' contributions to the PACs less an amount seized by the Attorney General's office prior to trial. On appeal, defendant argued that the victims did not suffer any loss. The Court of Appeals disagreed, finding that the victims contributed money to the defendant's PACs intending it to go to the presidential campaigns, and none of the contributions actually did go to the campaigns. *Dewald, supra* at _____. In addition, the amount of restitution was proper even though defendant did not personally benefit to the extent of the amount of the restitution ordered. *Id.* at ___, citing *Lueth, infra*.

Update: Crime Victim Rights Manual (Revised Edition)

CHAPTER 8

The Crime Victim at Trial

8.14 Former Testimony of Unavailable Witness

C. Defendant's Right to Confront the Witnesses Against Him or Her

Insert the following text after the June 2005 update to page 264:

In *United States v Arnold*, ___ F3d ___ (CA 6, 2005), the Sixth Circuit expounded on the Supreme Court's discussion of testimonial evidence in *Crawford v Washington*, 541 US 36, 50–62 (2004), by examining the dictionary definitions of the terms “testimony” and “testimonial.” In *Arnold*, the court noted that “[t]he Oxford English Dictionary (‘OED’) defines ‘testimonial’ as ‘serving as evidence; conducive to proof;’ as ‘verbal or documentary evidence;’ and as ‘[s]omething serving as proof or evidence.’ . . . The OED defines ‘testimony’ as ‘[p]ersonal or documentary evidence or attestation in support of a fact or statement; hence, *any form of evidence or proof*.’ . . . (emphasis added).” The Court further noted that Webster's Third New International Dictionary of the English Language “defines ‘testimonial’ as ‘something that serves as evidence: proof.’” The dictionary definitions, coupled with *Crawford's* standard that statements made to government officers— including police—are testimonial in nature and should not be admitted when a defendant has not had the opportunity to cross-examine the declarant, compelled the *Arnold* Court to conclude that the out-of-court statements were improperly admitted against the defendant at trial.

CHAPTER 10

Restitution

10.6 Persons or Entities Entitled to Restitution

A. Any Victim of the Course of Conduct That Gave Rise to the Conviction or Adjudication

On page 320, add the following text after the second full paragraph:

MCL 712A.30(1)(b) states in part:

“For purposes of subsections (2), (3), (6), (8), (9), and (13), victim includes a sole proprietorship, partnership, corporation, association, governmental entity, or other legal entity that suffers direct physical or financial harm as a result of a juvenile offense.”

MCL 780.794(1)(b) contains substantially similar language.

In *In re McEvoy*, ___ Mich App ___, ___ (2005), the trial court ordered the juvenile and his parents to pay restitution to a school district’s insurer.* On appeal, the juvenile’s parents argued “that pursuant to the definition of ‘victim’ in MCL 712A.30(1)(b), the school district is a victim for purposes of only ‘subsections (2), (3), (6), (8), (9), and (13)’ and therefore parents may not be required to pay restitution under subsection (15) to a ‘non-individual’ victim.” The Court of Appeals rejected this argument, stating:

“Foremost in negating appellants’ logic is the fact that the word victim does not appear in subsection (15), and therefore there is no need to define the term for purposes of that subsection. Further, the key language in the definition of the term ‘victim’ is identical in both the juvenile code and the CVRA[.] . . . Subsection (2) is the key substantive provision providing for restitution and that subsection expressly states that the court shall order that the juvenile ‘make full restitution to any victim,’ which by definition includes a legal entity such as the school district.” [Citations and footnotes omitted.] *McEvoy, supra* at ___.

More importantly, a review of the restitution provisions in both the Juvenile Code and CVRA reveal that the subsections not applicable to the definition of “non-individual” victims have no logical application to legal entities (e.g., restitution for physical or psychological injuries or death) or are primarily procedural.

*For more information on ordering a parent to pay restitution, see Section 10.13.

10.6 Persons or Entities Entitled to Restitution

B. Individuals or Entities That Have Compensated the Victim

On page 324, insert the following text immediately before subsection (C):

In *In re McEvoy*, ___ Mich App ___ (2005), the trial court ordered a juvenile's parents to pay restitution to a school district's insurer for damage caused by the juvenile setting fire to a high school. The restitution amount was based on the amount the insurer paid to the insured under the insurance policy—the replacement value of the damaged property. The Court of Appeals vacated the restitution order and remanded for redetermination of the amount of loss actually suffered by the school district. *Id.* at ___. The Court construed MCL 712A.30(8), which, like MCL 780.794(8), requires a court to order restitution to a legal entity that has compensated a direct victim “for a loss incurred by the [direct] victim to the extent of the compensation paid for that loss.” The Court stated that under MCL 712A.30(8), “an entity that compensated a victim ‘for a loss incurred by the victim’ is entitled to receive restitution ‘to the extent of the compensation paid for *that* loss,’ clearly meaning the loss of the victim, not the loss of the compensating entity.” *McEvoy, supra* at ___. The Court noted that the statutory provisions for calculating restitution for property damage or destruction use the value of the property damaged or destroyed—the victim's actual loss—as the basis for a restitution order. The Court stated:

“Under the circumstances of the case, the loss of the compensating entity is based on the commercial transaction involved, i.e., the school district's purchase of replacement coverage insurance, rather than the loss resulting from the fire, which underscores that the result is incongruent with the purpose of the statute. Although the amount of restitution is within the discretion of the trial court, the court erred to the extent it ordered restitution to SET-SEG on the basis of the amount SET-SEG compensated the school district, rather than the amount of the actual loss sustained by the school. Restitution must be based on the value of the property damaged, i.e., the victim's actual loss.” *Id.*

10.9 Calculating Restitution Where the Offense Results in Property Damage, Destruction, Loss, or Seizure

Insert the following text at the bottom of page 327:

In *In re McEvoy*, ___ Mich App ___ (2005), the trial court ordered a juvenile's parents to pay restitution to a school district's insurer for damage caused by the juvenile setting fire to a high school. The restitution amount was based on the amount the insurer paid to the insured under the insurance policy—the replacement value of the damaged property. The Court of Appeals vacated the restitution order and remanded for redetermination of the amount of loss actually suffered by the school district. *Id.* at ___. The Court construed MCL 712A.30(8), which, like MCL 780.794(8), requires a court to order restitution to a legal entity that has compensated a direct victim “for a loss incurred by the [direct] victim to the extent of the compensation paid for that loss.” The Court stated that under MCL 712A.30(8), “an entity that compensated a victim ‘for a loss incurred by the victim’ is entitled to receive restitution ‘to the extent of the compensation paid for *that* loss,’ clearly meaning the loss of the victim, not the loss of the compensating entity.” *McEvoy, supra* at ___. The Court noted that the statutory provisions for calculating restitution for property damage or destruction use the value of the property damaged or destroyed—the victim's actual loss—as the basis for a restitution order. The Court stated:

“Under the circumstances of the case, the loss of the compensating entity is based on the commercial transaction involved, i.e., the school district's purchase of replacement coverage insurance, rather than the loss resulting from the fire, which underscores that the result is incongruent with the purpose of the statute. Although the amount of restitution is within the discretion of the trial court, the court erred to the extent it ordered restitution to SET-SEG on the basis of the amount SET-SEG compensated the school district, rather than the amount of the actual loss sustained by the school. Restitution must be based on the value of the property damaged, i.e., the victim's actual loss.” *Id.*

10.13 Hearings on Restitution Payable by Parents of Juvenile Offenders

On page 335, insert the following text immediately before Section 10.14:

The Juvenile Code does not limit the amount of restitution for which a supervisory parent may be held liable. *In re McEvoy*, ___ Mich App ___, ___ (2005). In *McEvoy*, a juvenile pled guilty to arson of real property and malicious destruction of personal property for setting fire to a high school. The trial court ordered the juvenile and his supervising parents to pay restitution but limited the parents' liability to their insurance proceeds. The juvenile's parents appealed the order, arguing that the Parental Liability Act, MCL 600.2913,* when read along with MCL 712A.30, limits a parent's liability to \$2,500.00 in civil court actions. The Court of Appeals rejected the parents' argument, indicating that the Juvenile Code previously contained limits on a parent's liability, and the Legislature removed those limits. Furthermore, MCL 712A.30(9) provides that the amount of restitution paid to a victim must be set off against any compensatory damages recovered in a civil proceeding, clearly recognizing that restitution is independent of any damages sought in a civil proceeding.

*See Section 12.2 for a brief discussion of MCL 600.2913.

In *McEvoy*, the parents also argued that because MCL 712A.30(15) allows the court to impose unlimited restitution without a showing of fault on the part of the supervisory parent, it unconstitutionally deprives the parents of substantive due process. Applying a "rational basis" standard of review, the Court of Appeals disagreed. The Court first noted that although the Juvenile Code does not contain a limit on the amount a parent may be ordered to pay, it does limit imposition of liability to a parent having supervisory responsibility of the juvenile at the time of the criminal acts. In addition, a court must consider a parent's ability to pay and may cancel all or part of the parent's obligation if payment will impose a manifest hardship. Thus, parental liability may not be imposed solely based on a familial relationship.

"The Legislature has clearly sought to link *liability* with *responsibility* in a reasonable, but purposeful manner, rather than burdening society generally or the victim, in particular, for the costs of a juvenile's illegal acts. The statute reasonably imposes liability on the parent responsible for supervising the child." *McEvoy*, *supra* at ___.

The Court concluded that the provisions for restitution by a supervisory parent bear a reasonable relationship to a permissible legislative objective; therefore, there is no violation of the parents' due process rights.

The parents also argued "that MCL 712A.30 is an unconstitutional bill of attainder because it punishes parents for their status, not their conduct." *McEvoy*, *supra* at ___. A bill of attainder is a "legislative act that determines guilt and inflicts punishment upon an identifiable group of individuals without the protections of a judicial trial." *Id.* In order to determine whether the statute

acts as a bill of attainder, the court must determine if the statute “inflicts forbidden punishment.” The Court of Appeals determined that the restitution provisions of MCL 712A.30 “do not fall within the historical meaning of legislative punishment and are not validly characterized as punishment in the constitutional sense.” *McEvoy, supra* at _____. The restitution provisions were designed to serve a nonpunitive purpose: to enable victims to be fairly compensated for losses. The Court also noted that MCL 712A.30(16) and (17) are specific provisions to mitigate any undue financial burden imposed upon parents. The Court concluded that given the nonpunitive nature of the sanctions and the statute’s purpose and effect, it does not act as a bill of attainder.

June 2005

Update: Crime Victim Rights Manual (Revised Edition)

CHAPTER 7

Victim Notification

7.14 Notification of Post-Conviction DNA Testing

On page 158, replace the last sentence of the first paragraph with the following text:

All petitions must be filed no later than January 1, 2009.*

*2005 PA 4,
effective April
1, 2005.

CHAPTER 8

The Crime Victim at Trial

8.14 Former Testimony of Unavailable Witness

C. Defendant's Right to Confront the Witnesses Against Him or Her

Insert the following text at the end of the second-to-last paragraph on page 264:

See *United States v Garcia-Meza*, ___ F3d ___, ___ (CA 6, 2005), a case involving the rule that admission of an unavailable witness' statement does not violate the Confrontation Clause if the defendant caused the witness to be unavailable.

The *Garcia-Meza* Court also rejected the defendant's assertion that forfeiture of his right to confrontation only applies when a criminal defendant kills or otherwise prevents a witness from testifying with the specific intent to prevent him or her from testifying. Although FRE 804(b)(6) (and MRE 804(b)(6)) may contain this requirement, it is not a requirement of the Confrontation Clause. *Garcia-Meza, supra* at ___.

A witness' out-of-court photo identification of the defendants during police questioning was a testimonial statement improperly admitted through the testimony of the investigating officer where the witness did not testify at trial and the defendants did not have a previous opportunity to cross-examine the absent witness. *United States v Pugh*, ___ F3d ___, ___ (CA 6, 2005).

CHAPTER 12

The Relationship Between Criminal or Juvenile Proceedings & Civil Actions Filed by Crime Victims

12.3 Statutes of Limitations for Tort Actions

Insert the following text at the bottom of page 389:

The discovery rule is applied “to avoid unjust results which could occur when a reasonable and diligent plaintiff would be denied the opportunity to bring a claim due [] to . . . the inability of the plaintiff to learn of or identify the causal connection between the injury and the breach of a duty owed by a defendant.” *Trentadue v Buckler Automatic Lawn Sprinkler Co*, ____ Mich App ____ (2005).

In *Trentadue*, the plaintiff brought claims against the defendants that, without application of the discovery rule, would have been precluded by the relevant statutes of limitation. The defendants argued that the discovery rule could not be used to extend a claim’s date of accrual until the perpetrator’s identity is established or a plaintiff has determined all the causes of action possible. The Court of Appeals agreed with the plaintiff that the discovery rule applied to mark the date of accrual as the date on which the reasonable and diligent plaintiff discovered the causal relationship between the plaintiff’s injury (the victim’s death) and the defendants’ breach of a duty owed to the victim. *Id.* at ____.

The Court distinguished the case from cases of unknown identity to which the discovery rule does not apply. In *Trentadue*, the plaintiff was aware of the injury and the cause (the plaintiff’s decedent was murdered); what the plaintiff did not know, and could not have known until the killer’s culpability was established, was that other parties, based on their relationship to the killer, harmed the victim by breaching duties owed to the victim. *Id.* at ____.

April 2005

Update: Crime Victim Rights Manual

CHAPTER 10

Restitution

10.5 Persons or Entities Entitled to Restitution

B. Individuals or Entities That Have Compensated the Victim

Replace the last sentence on the bottom of page 239 with the following text:

See *People v Washpun*, 175 Mich App 420, 423 (1989) (prior to the statutory amendment that added the section quoted above, the Legislature intended insurance companies to receive restitution under the CVRA to the extent that they compensated victims for losses arising from crimes), and *People v Byard*, ___ Mich App ___, ___ (2005) (the Michigan Catastrophic Claims Association, a private association funded by Michigan drivers that compensates insurance companies for no-fault medical claims exceeding \$250,000.00, may be subrogated to an insurance company). An individual or entity that has compensated a victim need not file a claim to receive restitution under MCL 780.766(8), MCL 780.794(8), or MCL 780.826(8). *Byard, supra*.

CHAPTER 10

Restitution

10.9 Calculating Restitution Where the Offense Results in Physical or Psychological Injury, Serious Bodily Impairment, or Death

C. Triple Restitution for Serious Bodily Impairment or Death of a Victim

Insert the following text after the August 2004 update to this subsection:

A court may order up to triple the amount of any other restitution allowed under the CVRA, including restitution payable to insurance companies that have compensated the direct victim for losses incurred as a result of the offense. *People v Byard*, ___ Mich App ___ (2005). In *Byard*, the defendant was convicted of operating a motor vehicle while visibly impaired causing serious injury. It was undisputed that the victim suffered a serious impairment of body function. Defendant was ordered to pay \$659,128.09 to an insurance company and \$280,000.00 to the direct victim of the offense, \$250,000.00 of which was for “pain and suffering under MCL 780.766(5).” The Court of Appeals upheld the restitution order, stating:

“Defendant says that, because the victim did not suffer any out-of-pocket expenses, no restitution was ‘otherwise allowed under this section.’ MCL 780.766(5). However, the trial court ordered defendant to pay \$659,128.09 to Allstate Insurance Company for medical expenses and lost wages paid for the victim. MCL 780.766(4)(a) & (c) allows a court to award restitution for medical bills and lost wages. MCL 780.766(8) allows courts to award restitution to any person, government entity, or business or legal entity which compensates the victim for losses arising out of a defendant’s criminal conduct. Therefore, the award of restitution to Allstate was restitution ‘otherwise allowed under this section,’ and the \$659,128.09 award could potentially be tripled under MCL 780.766(5). Thus, the trial court did not err when it awarded \$250,000 to the victim under MCL 780.766(5).” *Byard, supra*.